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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

—v.—

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is one of its statewide affiliates. Since its founding in 1920, the ACLU has participated in numerous Establishment Clause and free speech cases before this Court, both as direct counsel and as *amicus curiae*, including most recently *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. __, 113 S.Ct. 2141 (1993); *Zobrest v Catalina Foothills School Dist.*, 509 U.S. __, 113 S.Ct. 2462 (1993), and *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. __, 114 S.Ct. 2481 (1994).

STATEMENT OF THE CASE

The University of Virginia recognizes and provides facilities and services to a wide range of student activities, known as "Contracted Independent Organizations" (CIOs). Most CIOs may also apply for student activity funds, which are derived from an annual $14 student activity fee.

> The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University . . . . [T]he monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purposes of the University as well as with State and Federal law.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Rosenberger v. The Rector and Visitors of the University of Virginia, 793 F.Supp. 175, 180 (W.D.Va. 1992), *aff'd*, 18 F.3d 269 (3d Cir. 1994).

Pursuant to its guidelines, however, the University does not fund either "religious organizations"[2] or "religious activities."[3] If a student organization is not disqualified on religious or other grounds, and its goals are deemed generally "consistent with the educational purposes of the University," the University then examines the group more closely, including investigation of possible discriminatory conduct, to decide if the group should receive funding. J.A. 71, ¶8.

The plaintiffs publish a student journal called "Wide Awake: A Christian Perspective at the University of Virginia." Although not affiliated with any religious institution, the journal is pervasively and concededly sectarian; its announced purpose is "to challenge Christians to live, in word and deed, according to the faith they proclaim[,] and to encourage students to consider what a personal relationship with Jesus Christ means." *Rosenberger*, 18 F.3d at 272. There is no dispute that "Wide Awake" is a religious activity within the meaning of the University's funding guidelines. *Id.* at 273. Accordingly, although it is a CIO with access to University computers, printers, and other publication equipment, *id.*, its application for direct funding was denied.[4]

Petitioners challenged the funding denial on free speech, free exercise, and equal protection grounds. The federal district court, ruling on cross motions for summary judgment, rejected all three claims. 793 F. Supp. 175. The court concluded that the student activity fund was a nonpublic forum and that the religious exclusion was reasonable and viewpoint-neutral; that the funding denial did not substantially burden petitioners' freedom of religion; and that no "discriminatory intent" was shown with respect to alleged disparate funding of religious groups. *Id.* at 178-83. Without fully addressing the Establishment Clause issue, the district court did note that the University's refusal to fund religious groups because of church-state concerns was "reasonable." *Id.* at 181.

The Court of Appeals for the Fourth Circuit affirmed, but gave more scrupulous consideration to petitioners' free speech claims. The court of appeals concluded that the religious exclusion was a viewpoint-based unconstitutional condition which could be upheld only if narrowly drawn and justified by a compelling state interest. 18 F.3d at 277-83.[5] The Fourth Circuit held that the Establishment Clause con-

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[2] The University's guidelines define "religious organization" as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Rosenberger*, 18 F.3d 269, 271 n.2 (3d Cir. 1994). Fraternities and sororities, "political" organizations, and groups with exclusionary membership policies are also ineligible for funding.

[3] The guidelines define "religious activity" as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." 18 F.3d at 271 n.2. Other excluded expenditures are "honoraria or similar fees, . . . social entertainment and related expenses, . . . philanthropic contributions and activities; and . . . political activities." *Id.* at 271.

[4] Because "Wide Awake's" funding application was denied, it was not subjected to the post-approval process of determining how much financial aid it should receive. This process involves an evaluation of "(1) the size of the group; (2) the University-wide benefits conferred by the group's activities; and (3) the group's financial self-sufficiency." *Rosenberger*, 18 F.3d at 271. If an organization is approved for financial aid, the University pays its costs directly after reviewing vouchers submitted by the group and determining that the expenditures are proper. *Id.*

[5] The court did not view public forum analysis as necessary or appropriate, given the factual context -- "content-based discrimination relating to government-generated burdens or benefits." 18 F.3d at 287.

stituted such a compelling interest because direct government funding of religious activities like "Wide Awake" would violate two of the three prongs of the test set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

First, according to the court of appeals, funding would have a primary effect of advancing religion because

> it would be difficult to view awarding SAF monies to "Wide Awake" as anything but state sponsorship -- and therefore advancement -- of religious belief . . . . Using public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation.

18 F.3d at 285. Second, funding religious activities would foster excessive government entanglement with religion, both because of its "potentially divisive political effect" and because it would "send an unmistakably clear signal that the University of Virginia supports Christian values." *Id.* at 286.[6]

The petition for *certiorari* followed.

SUMMARY OF ARGUMENT

This case presents a conflict between free speech and Establishment Clause principles. Under ordinary circumstances, government is barred from requiring relinquishment of constitutional rights as a condition of access to benefit programs. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[6] The Fourth Circuit viewed the free exercise claim as "abandoned," 18 F.3d at 277 n.23; and disposed of the equal protection argument on the ground that petitioners "fail[ed] to argue discriminatory intent as a matter of law." *Id.* at 288.

In addition, the Free Speech Clause requires viewpoint neutrality in the government's distribution of subsidies or other benefits. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983). Thus, although government may choose to subsidize one constitutionally protected activity and not another, *Rust v. Sullivan*, 500 U.S. 173 (1991), it may not base its decisions on the viewpoints or ideas expressed by those seeking funds. This is particularly true for government programs that themselves support free speech: universities, public fora, subsidies for scientific research or the arts.

To the extent that religious expression is to be considered a "viewpoint" for purposes of the speech clause, *Lamb's Chapel*, 113 S.Ct. at 2147-48, such expression cannot ordinarily be denied government benefits, such as access to meeting space, that are made available to other "viewpoints." Under a viewpoint analysis, as the Fourth Circuit has held, the University's exclusion of "religious activities" from funding eligibility *prima facie* violates the principle of viewpoint neutrality, or under an unconstitutional conditions analysis is presumptively defective in that it requires a sacrifice of expressive freedom for the sake of a government benefit.[7]

The Establishment Clause, however, prohibits direct government funding of religion. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Committee for Public Ed. and Religious*

[7] Alternatively, to the extent that the religious expression in this case is deemed excludable from University funding because of its religious subject matter, *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), the decision not to fund the expressive activity at issue would be impermissible even in a nonpublic forum unless demonstrably reasonable, and in a traditional public forum or its equivalent would violate the free speech guarantee unless justified by a compelling governmental interest.

Liberty v. Nyquist, 413 U.S. 756 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Contrary to the Fourth Circuit's reasoning, this is not because government funding necessarily implies endorsement. Indeed, it is a corollary of the principle of viewpoint neutrality that government subsidies, especially in the area of free expression, no more imply endorsement or sponsorship than does the government's maintenance of public fora where all can speak, or public libraries where authors of myriad viewpoints, from Marx to Madonna, are represented.

The Establishment Clause bars direct funding of religion for reasons independent of implied endorsement. Levying taxes to support religion was the main abuse that the framers in drafting the Establishment Clause sought to prevent. The Clause is unique in recognizing that government subsidy of religion through coercive taxation violates fundamental rights of individual conscience. When government funding for religion is involved, therefore, the Establishment Clause is best understood as a constitutionally ordained exception to the doctrines of unconstitutional conditions and viewpoint neutrality. Any other rule would, at the very least, require the Court to reexamine nearly a half-century of cases holding that the Establishment Clause forbids direct aid to parochial education even though the state simultaneously supports a secular, public education system. In our view, such a drastic departure from precedent is both unwarranted and unwise.

Petitioners argue that there is no meaningful difference between direct funding and other benefits to which the University admits religious groups are entitled: meeting space, use of University facilities, even tax exemptions and credits. But, as this Court explained in *Walz*, direct payments differ materially from indirect and incidental forms of assistance. Indirect aid, ranging from police and fire services to tax credits, does not require discretionary decisionmaking or the

active, affirmative transfer of government funds to church coffers. In our contemporary world, there is no way to sever religion from all forms of government assistance, nor is such absolute separation constitutionally required. But direct subsidies are qualitatively different, and violate the core meaning of the Establishment Clause, as the taxpayer standing cases recognize. *See Valley Forge v. Americans United*, 454 U.S. 464, 479 (1982).

A rule against direct financial support of religious activity does not mean that no student publication or group that receives University funds can address the question of religion, mount plays or art exhibits that reflect religious issues, or print any articles written from a religious viewpoint. The Establishment Clause prohibits direct funding only of pervasively sectarian activity, such as religious worship, training, and proselytizing. That the line-drawing may be difficult in some cases does not mean that it cannot be accomplished. If the law were otherwise, the Establishment and Free Exercise Clauses themselves would become meaningless. For every case involving either clause initially requires a determination whether the activity in question is in fact religion.

ARGUMENT

I. THE UNIVERSITY'S POLICY PRESUMPTIVELY VIOLATES THE FIRST AMENDMENT'S FREE SPEECH GUARANTEE

A. The Policy Constitutes Viewpoint Discrimination In The Distribution Of A Government Subsidy

Although individuals and groups may have no right to a public benefit or subsidy, government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan v. Taxation with*

Representation, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959), and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[8] Such "viewpoint discrimination" in the distribution of public funds carries special danger because it gives government the power, by manipulating the terms of subsidy programs, to "curtail expression of a particular point of view," *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), thus suppressing disfavored viewpoints and shrinking the marketplace of ideas.[9]

In *Rust v. Sullivan*, 500 U.S. 173, this Court emphasized the difference between unconstitutional viewpoint discrimination and legitimate limitations on the scope of subsidy programs. In particular, *Rust* reaffirmed the principle that viewpoint discrimination in government subsidies is prohibited. *Id.* at 192. The Court concluded, however, that the principle of viewpoint neutrality had not been violated in *Rust*. The Court reached this conclusion by noting that, unlike *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), *Rust* did not involve "a general law singling out a disfavored group on the basis of speech content," but a simple "refus[al] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

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[8] The court of appeals in its opinion merged the separate issues of viewpoint discrimination and unconstitutional conditions, 18 F.3d at 278-81. A subsidy may be impermissibly viewpoint-based yet not amount to an unconstitutional condition, *i.e.*, a forced relinquishment of a constitutional right. *See* §IB, *infra*. Likewise, an unconstitutional condition may be unrelated to the viewpoint of speech.

[9] *See also Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988)("a [student] group has no right to funding, but when funds are made available, they must be distributed in a viewpoint-neutral manner, absent other considerations"); *cf. Board of Education, Island Trees School Dist. v. Pico*, 457 U.S. 853, 871 (1982)("[o]ur Constitution does not permit the official suppression of *ideas*)(emphasis in original).

Id. at 194.

In this case, the University has not established and funded a defined program or project. Instead, it has set aside a pool of funds for use by publications and other student groups whose activities "relate[] to the educational purpose of the University."[10] Thus, the facts of this case more closely resemble *Ragland* than *Rust*. Like *Ragland*, the decision to exclude one category of otherwise fundable activity based on its viewpoint discriminates in funding based on the content of the students' ideas. As a matter of free speech doctrine, moreover, the Court has recently made clear that

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[10] The "educational purpose" test itself is not objectionable in the context of student activity funding, and is facially consistent with the principle of viewpoint neutrality. So long as it is not used as a subterfuge for viewpoint discrimination, educational purpose is a legitimate limit on funding, just as academic merit is a legitimate basis for tenure decisions, and artistic merit a legitimate basis for government grants to artists. *See Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981)("[n]or do we question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'")(quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring), and citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-13 (1978)); *Widmar*, 454 U.S. at 278-80 (Stevens, J., concurring)(university may legitimately decide to reserve room for performance of HAMLET rather than showing of Mickey Mouse cartoons, but "may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted"); *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1475 (C.D.Cal. 1992) (where "limited public funds are allocated to support expressive activities, . . . some content-based decisions are unavoidable . . . [but] this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university . . . . Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not").

the general rule against viewpoint discrimination applies to religious perspectives. *See Lamb's Chapel*, 113 S.Ct. at 2147-48.[11]

The rule against viewpoint discrimination is particularly important in an academic setting, the quintessential "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). As the Court reaffirmed in *Rust*,

> [T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

500 U.S. at 200. Given the importance of free speech and inquiry at the university level, excluding any viewpoint from general funding eligibility raises, at a minimum, serious constitutional questions.

B. The Policy Presumptively Imposes An Unconstitutional Condition

The exclusion of religious viewpoints from funding eligibility also presumptively imposes an unconstitutional condition. At least since *Speiser v. Randall*, 357 U.S. 513, and *Perry v. Sindermann*, 408 U.S. 593, it has been clear that government cannot condition a subsidy or other benefit on

[11] Since the exclusion from funding here is viewpoint-based, as in *Lamb's Chapel*, there is no need to decide whether the subsidy program is a designated public forum. Even in a nonpublic forum, exclusions cannot be based on viewpoint. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. at 811-13; *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983).

relinquishment of a constitutional right. As the court below observed:

> Unconstitutional conditions, which make enjoyment of a government benefit contingent on sacrifice of an independent constitutional right, are *prima facie* invalid. For "if the government could deny a benefit to a person because of his constitutionally protected speech . . . his exercise of th[at] freedom[] would in effect be penalized and inhibited . . . ."

Rosenberger, 18 F.3d at 279 (quoting *Perry v. Sindermann*, 408 U.S. at 597).

The difference between an unconstitutional condition and a limitation on the terms of a subsidy is that, in the former case, exercise of constitutional rights outside the confines of the funded program is suppressed as a condition of obtaining the funds. Thus, *League of Women Voters* involved an unconstitutional condition because educational broadcasting received only 1% of its overall income from federal grants yet was barred as a condition of those grants from all editorializing, 468 U.S. at 400. As this Court explained in *Rust*, government imposes an unconstitutional condition when it

> place[s] a condition on the *recipient* of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

500 U.S. at 196 (emphasis in original).

In both *Speiser* and *Perry*, free speech was the constitutional right relinquished in exchange for the benefits, respectively, of tax exemption and state employment; in *Sherbert*

v. Verner, 374 U.S. 398 (1963), the right relinquished was free exercise of religion, in exchange for the benefit of unemployment compensation. In the present case, as the Fo th Circuit correctly ruled, the exclusion of "religious activity" from funding eligibility essentially forced the student publishers of "Wide Awake" to abandon their religious perspective entirely if they wanted even a small amount of University funding. As in *League of Women Voters*, 468 U.S. at 399-400, and *Finley v. NEA*, 795 F.Supp. at 1463-64, the restriction thus has effects beyond the bounds of the subsidized activity, and is presumptively unconstitutional.

II. THE ESTABLISHMENT CLAUSE ABSOLUTELY BARS DIRECT EXPENDITURE OF GOVERNMENT FUNDS TO SUPPORT RELIGION AND THUS OVERRIDES THE FREE SPEECH INTERESTS IN THIS CASE

A. The Establishment Clause Is An Absolute Bar To Direct Government Funding Of Religion

Despite the serious free speech concerns raised by the exclusion of religious activities and organizations from the University's funding program, the Establishment Clause forbids direct government subsidies to religion, and thus creates a constitutionally mandated exception to the usual principle of viewpoint neutrality. Petitioners attempt to circumvent this basic no-funding rule essentially by arguing that it only applies where government is sponsoring the religious message or favoring some faiths over others. But petitioners' argument has no limiting principle, is unsupported by constitutional history,[12] would eviscerate the Establishment

[12] The contemporaneous history of the Establishment Clause utterly fails (continued...)

Clause, and would require overruling nearly 50 years of this Court's jurisprudence barring expenditure of government funds for pervasively sectarian activities.[13]

The Establishment Clause bars government funding of religion for at least three important reasons. First, the framers recognized that religious free exercise was threatened, not enhanced, by government support. *See, e.g., Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2656-57 (1992); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968); *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); Mark DeWolfe Howe,

[12] (...continued)
to support the view that the Clause was only designed to bar preferential treatment of some religions over others. *See, e.g.*, Leonard W. Levy, THE ESTABLISHMENT CLAUSE (1986); Leo Pfeffer, CHURCH, STATE, AND FREEDOM (1953); Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 Wm. & Mary L.Rev. 875 (1986); James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947).

Likewise, the notion that the Clause was only meant to prohibit financial aid to religion where the government itself was dictating or sponsoring the message is belied by the fact that evenhanded subsidies to multiple churches were prohibited, as were schemes permitting taxpayer choice of which religion to support. Levy, *supra* note 11, at 25-62; Thomas J. Curry, THE FIRST FREEDOMS 198, 210-13 (1986); Pfeffer, *supra* note 11, at 133-55; Laycock, *supra*, at 896-99; Madison, *supra*; *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)(Clause bars aid to one or all religions); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 (1989)(Establishment Clause doesn't only limit "religious content of the government's own communications" but also "prohibits the government's support and promotion of religious communications by religious organizations").

[13] Because the bar on direct government funding of religious proselytizing is absolute, there is no need for the Court to engage in compelling state interest analysis as the court did below, 18 F.3d at 281-82. In any event, however, the Establishment Clause certainly qualifies as a compelling interest.

THE GARDEN AND THE WILDERNESS (1965); Madison, *supra*, 330 U.S. at 67-69. Second, they feared that government aid to religion would breed brutal, divisive, and potentially bloody rivalries among sects. *E.g., Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 749 (1976); *Lemon v. Kurtzman*, 403 U.S. at 622-23; Madison, *supra*, 330 U.S. at 69-70. Third, they respected the sanctity of individual conscience, and consequently determined to prohibit compelled tax support of ministers or churches. *Everson*, 330 U.S. at 8-14; *Edwards v. Aguillard*, 482 U.S. 578, 605-06 (1987)(Powell and O'Connor, JJ., concurring).

Thus, as numerous scholars have explained, an "establishment of religion" in colonial times was chiefly understood as financial support of religion by public taxation. *See* Levy, *supra* note 11, at 9, 61; *id.* at 25-62 (documenting state constitutional bans on forced taxation for one or all churches, in violation of individual conscience); Pfeffer, *supra note 11*, at 133-59 (1953); Curry, *supra* note 12, at 216-17, 220-22 (1986); Philip B. Kurland, "The Origins of the Religion Clauses of the Constitution," 27 Wm. & Mary L.Rev. 839, 842, 859 (1986)(use of a taxpayer's money to aid religion is an interference with that taxpayer's liberty); Laycock, *supra note 11*, at 875, 917, 922 (framers rejected any form of tax support; "religion was to be wholly voluntary").[14]

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[14] Even Professor McConnell acknowledges that "legal compulsion to support" religious activities through taxes is the essence of an Establishment Clause violation. Michael W. McConnell, "Coercion: The Lost Element of Establishment," 27 Wm. & Mary L.Rev. 933, 938 (1986).

Amici Christian Legal Society, *et al.* suggest that the no-funding principle is limited to special tax assessments specifically to aid religion. Br. at 22. Their argument ignores the realities of modern taxation and would render the Establishment Clause meaningless today when most government expenditures come from general tax funds.

The Establishment Clause is unique among constitutional provisions in its recognition that coerced tax funding for religion violates rights of individual conscience. Nowhere else in the Constitution is forced taxation to support activities that the taxpayer may oppose deemed to be a violation of fundamental liberty. *See League of Women Voters*, 468 U.S. at 385 n.16 (ordinarily taxpayers have no constitutional basis to object to government expenditures). The Court has emphasized this uniqueness: *Flast v. Cohen*, 392 U.S. at 103-04, recognized taxpayer standing to challenge expenditures for religion because

> [o]ur history vividly illustrates that one of the evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general . . . . The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.

This Court reaffirmed the Establishment Clause exception to rules against taxpayer standing in *Valley Forge College v. Americans United*, 454 U.S. at 479, explaining that the *Flast* plaintiffs could sue because their challenge was based on the Clause's "specific constitutional limitation upon the exercise by Congress of the taxing and spending power . . . ." *See also Bowen v. Kendrick*, 487 U.S. at 618 ("we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . . .").[15]

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[15] The student fees here are functionally equivalent to taxes for Estab-

(continued...)

The Justices of this Court have unanimously affirmed the constitutional bar to direct government funding of religion in majority, concurring, and dissenting opinions in nearly every Establishment Clause case. Thus, for example, in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, the Court upheld government provision of a sign language interpreter to a parochial school student, but only because "no funds traceable to the government ever find their way into sectarian schools' coffers." *Id.* at 2467-68. The Court distinguished earlier cases in which "direct grants of government aid" were unconstitutional because they "relieved sectarian schools of costs they otherwise would have borne," reiterating that "a direct cash subsidy" to a religious school is impermissible. *Id.* at 2468. In *Mueller v. Allen*, 463 U.S. 388, 400 (1983), similarly upholding a program of aid to parents, the majority took for granted that the Establishment Clause prohibits "payment of state funds to one or more churches." *See also Edwards v. Aguillard*, 482 U.S. at 605 (Powell and O'Connor, JJ., concurring)(origin of Establishment Clause in resistance to "forced support of state-established churches"); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 490-91 (1986)(Powell, Burger, & Rehnquist, JJ., concurring)(neutral aid programs permissible only because "any aid to religion results from the private choices of individual beneficiaries"); *Larson v. Valente*, 456 U.S. 228, 244 (1982)(purpose of Establishment Clause was to prohibit government from taxing citizens "for the support of a denomination to which they did not belong").[16]

Bowen v. Kendrick, 487 U.S. 589, is dispositive on this point. The Court in *Kendrick* reversed a judgment that the Adolescent Family Life Act was unconstitutional on its face, and remanded for a determination whether particular grants under the Act went to pervasively sectarian activity or otherwise directly subsidized religion. All Justices agreed that direct funding for religious proselytizing would violate the Establishment Clause.

Chief Justice Rehnquist, writing for the majority in *Kendrick*, explained that although religious institutions are not "disabled by the First Amendment from participating in publicly sponsored social welfare programs," direct government aid to "pervasively sectarian" institutions might well have the primary effect of impermissibly advancing religion,

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[15] (...continued)
lishment Clause purposes. They are involuntary, and courts have generally refused to allow students to opt out of paying them because they disagree with the views of one or more funded organizations. J.A. 37, ¶8. *See Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 300 (1992); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *but see Smith v. Associated Students of the Univ. of Cal.*, 844 P.2d 500 (Cal.Sup.Ct.), *cert. denied*, 114 S.Ct. 181 (1993)(departing from consistent line of cases rejecting dissenters' challenges to mandatory fees to fund a range of student activities).

Indeed, even if objecting students could demand a refund of a portion of their fees, the University's administering of a system of direct financial support for religion would violate the Establishment Clause. The Clause was designed to prohibit government-administered assessments for religion, even if those taxed could choose which religion to support, and even if dissenters and atheists could opt out. *See, e.g.*, Levy, *supra* note 11; Laycock, *supra note 11*.

[16] *See also Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. at 774, 780 (direct subsidies to religious activities of sectarian schools invalid); *id.* at 801 (Burger and Rehnquist, JJ., concurring in part and dissenting in part)(direct aid to religious institutions prohibited); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)("[g]overnment may not finance religious groups . . . ."); *McCollum v. Board of Education*, 333 U.S. 203, 249 (1948)(Reed, J., dissenting)("[o]f course, no tax can be levied to support organizations intended 'to teach or practice religion'"); *Everson v. Board of Educ.*, 330 U.S. at 16 ("[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion").

and would surely do so where the funding supported the institution's "religious mission." *Id.* at 609, 610. Moreover, he said, the Establishment Clause *flatly prohibits* "'government-financed . . . indoctrination into the beliefs of a particular religious faith,'" and the Court has "accordingly struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid." *Id.* at 611-12 (quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985); and *Meek v. Pittenger*, 421 U.S. 349, 370 (1975)). The Court instructed the district judge on remand to determine whether federal aid was flowing to "pervasively sectarian" institutions or was funding "materials that have an explicitly religious content or are designed to inculcate the views of a particular faith." 487 U.S. at 621.

Justice O'Connor, concurring in *Kendrick*, agreed that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (emphasis in original). Justices Kennedy and Scalia, also concurring, stated that the relevant inquiry was whether "funds are in fact being used to further religion," *id.* at 624. There was thus universal agreement that the direct use of government funds to support religious proselytizing -- precisely the situation in the present case -- is unconstitutional. Here, just as in *Kendrick*, no matter how salutary a general benefits program may be, it cannot directly fund religious proselytizing.

Petitioners weakly suggest that *Kendrick* may be distinguished on the ground that there the funded organizations were "grantees to convey the government's own messages." Brief at 28. Nothing in *Kendrick* or in the history or jurisprudence of the Establishment Clause supports such an artificial distinction. This Court's parochial school aid cases contain no hint that funding is improper only if the parochial schools are purveying the government's views. Indeed,

petitioners recognize the fundamental incompatibility of their position with this Court's parochial school aid decisions; thus, they urge the Court to "overrule the principle announced in those cases," which they characterize as a bar on government benefits bestowed "on a neutral basis" to "'pervasively sectarian institutions or 'specifically religious' activities." Br. at 41.[17]

Amici Christian Legal Society, *et al.* also attempt to avoid the thrust of *Bowen v. Kendrick* and other funding cases by arguing that the purposes of the Establishment Clause are not served by excluding religious activities from a general funding program. They describe the Establishment Clause no-funding principle as simply designed to prevent government from endorsing religion or expanding its influence "in a field where that influence should be minimized." Br. at 6-7. But the no-funding principle is not intended merely to foreclose *government* advocacy of religion. An equally fundamental Establishment Clause goal is to protect against direct government support for *private* religious activity.

Petitioners' and *amici*'s purported reconciliation of the conflicting free speech and establishment principles in this

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[17] Petitioners argue in the alternative that this Court's parochial school aid decisions are distinguishable from the present case because they assume that the subsidies involved did not derive from general benefit programs but overwhelmingly favored religion. Br. at 39-40. This is an imaginative but myopic reading of the parochaid cases. Those cases do not turn on a perception of favoritism to religious schools, but on this Court's appreciation of the dangers of administrative entanglement, political divisiveness, coerced tax support in violation of religious conscience, and direct government advancement of religious indoctrination. *See, e.g., Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. at 770-93; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 747-54 (summarizing cases); *Aguilar v. Felton*, 473 U.S. at 409-14; id. at 415-19 (Powell, J., concurring).

case thus winds up eviscerating the Establishment Clause by inviting direct government funding of religious proselytizing and worship. They suggest no limits to their argument that direct tax support for religious indoctrination is proper -- indeed, is constitutionally mandated -- so long as it is even-handed and not equivalent to government endorsement of the beliefs purveyed. Under their interpretation of "neutrality," Congress could -- or indeed, would be obliged to -- appropriate funds for churches anytime it funded other charitable endeavors, and to subsidize religious schools, or school prayer in public schools, anytime it subsidized secular public education.

B. Direct Government Funding for Religious Activity Would Create Serious and Divisive Entanglement Problems

Requiring the University to provide funding for religious groups would also violate the Establishment Clause by creating inevitable entanglement between the University and its students' sectarian activity. University funding decisions are highly discretionary, based on each student group's goals and conduct, its financial self-sufficiency, the extent to which it advances the University's "educational purpose," and "the University-wide benefits conferred by [its] activities." *Rosenberger*, 18 F.3d at 271; J.A. 71. The Religion Clauses of the First Amendment were designed precisely to preclude government from making such inquiries and judgments about the value of particular religious activities or their potential benefits to the populace.

> [There exists an] overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989)(quoting *United States v. Lee*, 455 U.S. 253, 263 (1982)(Stevens, J., concurring)). *See also Larson v. Valente*, 456 U.S. at 255 ("'state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids'")(quoting *Lemon v. Kurtzman*, 403 U.S. at 620); *cf. United States v. Ballard*, 322 U.S. 78 (1944)(government cannot evaluate truth or falsity of religious beliefs).

Under the University's criteria, moreover, the "size of the group" is a relevant funding consideration. Thus, the most popular religion would have a claim to the largest grant. Few prospects are more chilling to religious liberty than such government favoritism to populous, majoritarian faiths. By contrast, in *Zobrest*, *Witters*, and *Mueller*, benefits ultimately accruing to sectarian schools were acceptable because they were incidental, not direct; and individuals, not government, made the choices about which religions to favor.

Nor would the entanglement problems subside once the University's funding decisions were made. University staff examine the finances and operation of each funded group not only during the grantmaking process but on an ongoing basis, to ascertain whether the group's expenses are reasonable and proper. *Rosenberger*, 18 F.3d at 271. Thus, the direct money subsidy here would create a "'relationship pregnant with involvement . . . [which] could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.'" *Lemon v. Kurtzman*, 403 U.S. at 621 (quoting *Walz v. Tax Comm'n*, 397 U.S. at 675).

Finally and, perhaps most ominously, competition for funding among student religious groups would breed political rivalry and strife. It was a primary purpose of the Establishment Clause to prevent competition for government

support among rival religious factions. Now as then, the best guarantee of religious freedom is to keep it free of government entanglement in the form of direct subsidies and the discretionary decisions they require. This Court has recognized that direct government funding of religion presents the greatest danger of sectarian warfare, and that political divisiveness is therefore an appropriate and necessary inquiry where direct funding is at issue. *Bowen v. Kendrick*, 487 U.S. at 617 n.14; *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Mueller v. Allen*, 463 U.S. at 403-04 n.11.

C. Direct Funding Is Significantly Different From Tax Exemption, Access To Public Space, Or Other Incidental and Generally Available Benefits

Petitioners liken the aid sought here to permissible tax exemptions for churches, *Walz v. Tax Comm'n*, or generally available public benefits such as access to meeting space, *Widmar v. Vincent*, or assistance to the handicapped, *Zobrest v. Catalina Foothills School Dist.*; *Witters v. Washington Dep't of Serv. for the Blind*. But direct funding for religion is materially different; it entails discretionary decisionmaking, breeds religious warfare, and coerces individual religious conscience in ways that provision of general benefits does not. As the Court explained in *Walz*, tax exemption is "an indirect economic benefit," in which "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Direct subsidy, by contrast, "would be a relationship pregnant with involvement . . . . The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." 397 U.S. at 674, 675.

Justice Harlan's concurrence in *Walz* explained the difference in terms particularly applicable to this case: "[s]ubsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy . . . ." *Id.* at 699.[18] Justice Brennan, likewise, observed that exemptions and direct subsidies are "qualitatively different" because subsidy involves "direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole," while exemption assists "only passively" and does not "'forcibly divert[] the income of both believers and nonbelievers to churches.'" *Id.* at 690-91 (concurring opinion)(quoting Donald A. Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development, Part II," 81 Harv. L.Rev. 513, 553 (1968)). Justice Scalia, dissenting in *Texas Monthly, Inc. v. Bullock*, embraced this same crucial distinction between passive, incidental assistance and affirmative diversion of government funds to religious activity. 489 U.S. at 43 (also quoting Giannella).

Making public facilities or other benefits generally available to religious as well as secular groups is also not problematic in the way that direct financial subsidies are. Such evenhandedness in the distribution of benefits entails no forced diversion of tax funds, no governmental judgments about the relative value or public benefit of different religious views, no government entanglement in religious groups' administrative affairs, and little or no political divisiveness. As the Court explained in *Widmar*, "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." 454 U.S. at 273. *See also Lynch v. Donnelly*, 465 U.S. 668, 683 (1984).

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[18] He added: "subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case." 397 U.S. at 699.

D. Direct Funding Of Religious Groups Violates The Establishment Clause Independent Of Any Imagined Appearance Of Governmment Endorsement

As the foregoing analysis has shown, direct funding of religious proselytizing contravenes the Establishment Clause independent of any appearance of government sponsorship or endorsement. In addition, the Fourth Circuit held that any University subsidy for "Wide Awake" would violate the Establishment Clause by conveying a message of government endorsement. 18 F.3d at 285-86. In contrast to government-sponsored nativity scenes or school prayers,[19] however, there is no message of endorsement when the government creates a system designed to fund a broad range of expressive activities. Under those circumstances, public funding for a specific expressive activity no more conveys a message of endorsement than does the speech of professors at public universities, the works of artists who receive government grants, the availability of books in public libraries, or the access of any group to a governmentally maintained public forum such as a street or park.

If this were not the case, the entire edifice of First Amendment free speech doctrine would be threatened. Public forum analysis, the principle of viewpoint neutrality in subsidy or benefit programs, the First Amendment protection for diverse ideas afforded to public universities and libraries, and the bar on unconstitutional conditions all depend on an appreciation by the public and by the courts that access to benefits, including funding, is not equivalent to sponsorship or "government speech." This understanding is especially crucial where, as in this case, the government is providing benefits and funding that generally promote expression and intellectual inquiry, and expand the marketplace of ideas. *League of Women Voters*, 468 U.S. at 378-79.

This Court has recognized repeatedly that funding or other benefits, especially in the area of expression, do not necessarily imply endorsement. For example, in *Widmar*, the Court noted:

> [A]n open forum in a public university does not confer any imprimatur of State approval on religious sects or practices . . . . [S]uch a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

454 U.S. at 274 (quoting lower court opinion). The same principle, and its inevitably contextual analysis, applies whether or not the alleged endorsement is religious.[20]

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[19] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668; *Lee v. Weisman*, 112 S.Ct. 2649; *Stone v. Graham*, 449 U.S. 39 (1980); *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. at 2499, (O'Connor, J., concurring)(endorsement analysis is useful in special benefits cases like *Lee*, *Lynch*, *Stone*, and *County of Allegheny*, but is not the only test for Establishment Clause violations).

[20] In this case the standard CIO agreement already states that University benefits "should not be misinterpreted as meaning that [the recipient] organizations are part of or controlled by the University, . . . or that the University approves of the organizations' goals or activities." J.A. 26; *see also* J.A. 27-29, ¶¶2-4 (requiring, *inter alia*, that CIOs state their independence from the University in all written materials). *See League of Women Voters*, 468 U.S. at 395. This is not to say that disclaimers will always be sufficient to avoid Establishment Clause problems where other indicia of government sponsorship exist.

E. Determining When An Activity Is "Religious" and Thus Barred From Direct Funding May Sometimes Be Difficult, But Is Necessary Under The Establishment Clause

Determining whether an activity is "religious" within the meaning of the University's guidelines and, indeed, of the Establishment Clause, will be relatively simple in some circumstances (such as the present case), and more difficult in others, where student publications or organizations present a mix of secular and sectarian speech. The problem of line-drawing in some situations is unavoidable but not insoluble, and in any event is a familiar exercise under both the Free Exercise and Establishment Clauses.

Thus, in *United States v. Seeger*, 380 U.S. 163 (1965), this Court had to define religious belief for purposes of the conscientious objector exemption from the Selective Service law. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court had to distinguish truly religious from secular philosophical beliefs in order to resolve a free exercise claim of exemption from compulsory education laws. In *County of Allegheny v. ACLU*, 492 U.S. at 614 n.60, the Court recognized that Establishment Clause cases commonly require factual inquiry into the nature and meaning of religious symbols. As the Court observed in *Widmar*,

> the Establishment Clause requires the State to distinguish between "religious" speech . . . and "nonreligious" speech . . . . This distinction is required by the plain text of the Constitution.

454 U.S. at 371 n.9.

Bowen v. Kendrick itself provides a useful guide for any government agency that must determine when the Establishment Clause bars direct funding of "religion." If an organi-

zation is "pervasively sectarian," then there is a strong likelihood (if not a certainty) that government funding would unconstitutionally support proselytizing, worship, or other religious activity. *See* 487 U.S. at 609-10; *see also Hunt v. McNair*, 413 U.S. 734, 743 (1973). Similarly, if a publication is engaged in "indoctrination into the beliefs of a particular religious faith," *Kendrick*, 487 U.S. at 611-12, as in this case, then the Establishment Clause prohibits direct funding of that publication. If, on the other hand, a group or journal is primarily secular but occasionally sponsors a discussion including religious perspectives, or publishes some articles reflecting a religious point of view, funding of that group or journal should no more be forbidden than public schools are forbidden from teaching *about* religion simply because they may not mount religious ceremonies or proselytize.

Despite petitioners' attempt to blur the line between "culture" and "religion,"[21] and to persuade this Court that all

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[21] Petitioners exaggerate the definitional problems arising in this case from the University's refusal to fund "religious activities." Brief at 20. The Muslim and Jewish groups whose funding it challenges do not appear, on this record, pervasively sectarian or primarily engaged in religious proselytizing. There is even less evidence in the record that the C.S. Lewis Society engaged in religious proselytizing.

The fact that among the Muslim Students Association's aims is to "promote a better understanding of Islam," J.A. 92, would not in itself qualify the group as pervasively sectarian or proselytizing, although obviously it should not receive funding for any religious activity it might pursue. Whether the association's magazine, "Al Salam," constitutes a religious activity, *see* Pet.Br. at 5 n.2, presents a factual question that may require remand for adjudication of petitioners' equal protection claim. For if it is the case that the University is supporting some religions and not others, then the petitioners' equal protection argument is correct. The remedy, however, would not be to fund all religions, in violation of the Establishment Clause, but to assure that no religious activities at all receive government subsidies.

(continued...)

distinctions in this area are hopelessly subjective and constitutionally dubious, the religion clauses demand that such distinctions be made frequently by government agencies, including public universities and courts. Urging that they are too difficult is essentially an argument for obliterating the Establishment Clause altogether.

[21] (...continued)

In addition, *amici* Christian Legal Society, *et al.* contends that the principle of neutrality requires the University to fund "Wide Awake" because it funds what *amici* describe as a "wide range of non-religious and anti-religious speech." Br. at 11. There are at least two problems with this argument. First, the materials referred to by *amici* are not in the record. Second, the argument proves far too much. If the principle of neutrality required the government to fund religious speech whenever it funded nonreligious speech, then it would also require the government to teach creationism whenever it taught evolution. This Court has already rejected that false symmetry. *See Edwards v. Aguillard*, 482 U.S. 578.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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